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PKR v KDS

B HIGH COURT (KUALA LUMPUR) — PETITION NO WA-33–627–10 OF 2019
EVROL MARIETTE PETERS J
31 JULY 2022

C *Family Law — Divorce — Irretrievable breakdown of marriage — Petitioner filed petition on ground that parties to marriage had lived apart for continuous period of at least two years — Petitioner claimed to retain mobile telephone number as his — Whether marriage had irretrievably broken down — Whether petitioner entitled to mobile telephone number — Law Reform Act 1976 ss 53 & 54*

D

The petitioner husband ('petitioner') and respondent wife ('respondent') solemnised their marriage in October 1997 and were blessed with a child. They lived in their home in Kuala Lumpur ('the matrimonial home'). In March E 2016, the petitioner suffered a stroke, resulting in partial paralysis and his inability to speak or write. In April 2017, the petitioner left the matrimonial home to reside in Seremban, in his family's residence, where he remained until now and in their care. In November 2017, the respondent applied to court to challenge the mental capacity of the petitioner, in an attempt to compel him to F return to the matrimonial home. The court, however, found the petitioner to be of sound mind, and as a result thereof, the respondent withdrew such application. In May 2018, the petitioner filed a divorce petition ('the first divorce petition'), seeking to dissolve the marriage on ground of the respondent's unreasonable behaviour. However, since proof of unreasonable G behaviour was required, the petitioner withdrew the first divorce petition. The petitioner then filed this petition on the ground that the parties to the marriage had lived apart for a continuous period of at least two years. In terms of the matrimonial home and matrimonial assets, the petitioner had relinquished most of the items he had pleaded for, which included his share in the H matrimonial home, an asset purchased in Petaling Jaya, his shares in a company ie Sykt Global Engineering and Automation ('SGEA') and even maintenance. All he asked for was to retain a particular mobile telephone number ('the number') as his. The number which had been registered in his personal name, was transferred to a mobile telephone plan which was registered in the name of I SGEA after the petitioner had suffered the stroke in 2016. Although the number was registered in the name of SGEA, it had continuously been utilised by the petitioner as his personal contact number since 1990. The issues for determination were: (a) whether the marriage had irretrievably broken down; and (b) whether the petitioner was entitled to the mobile telephone number.

Held, allowing the petition:

(1) The petitioner's decision to leave the matrimonial home was made himself voluntarily, and on his own accord. He was neither pressured nor coerced into making such move. The decision to leave the matrimonial home was due to numerous marital problems between the petitioner and the respondent which included leaving the petitioner alone in the locked house, in his condition, without any supervision or care. The petitioner had been consistent in making it clear and unequivocal about his intention to dissolve the marriage. There was no reason why the petition should not be granted, since the parties had been separated for more than five years. A five-year separation was undeniably a prima facie indication that the marriage had irretrievably broken down. The marriage had a reached a point of no return and resulting in a state of hopelessness which, the court should not countenance. The marriage had in fact irretrievably broken down and the only way forward was to dissolve it (see paras 10–12 & 22–23).

(2) The respondent was extremely inequitable and injudicious in her conduct in resisting the petitioner's plea for the number. It would be more detrimental and inequitable to the petitioner if he was denied the number. The respondent, on the other hand, was in a position to contact all her business associates and acquaintances to inform them of the change of the number of SGEA. Furthermore, this was the only item that the petitioner sought in this petition and it would be extremely unfair to deny the petitioner just this one thing (see paras 27–29).

[Bahasa Malaysia summary

Pempetisyen suami ('pempetisyen') dan responden isteri ('responden') berkahwin pada Oktober 1997 dan dikurniakan seorang anak. Mereka tinggal di rumah mereka di Kuala Lumpur ('rumah perkahwinan'). Pada Mac 2016, pempetisyen mengalami strok, mengakibatkan lumpuh separuh badan dan ketidakupayaannya untuk bercakap atau menulis. Pada April 2017, pempetisyen meninggalkan rumah kelamin untuk menetap di Seremban, di kediaman keluarganya, di mana dia tinggal sehingga kini dan dalam jagaan mereka. Pada November 2017, responden memohon kepada mahkamah untuk mencabar keupayaan mental pempetisyen, dalam usaha untuk memaksanya pulang ke rumah kelamin. Mahkamah, walau bagaimanapun, mendapati pempetisyen mempunyai fikiran yang waras, dan akibatnya, responden telah menarik balik permohonan tersebut. Pada Mei 2018, pempetisyen memfailkan petisyen perceraian cerai ('petisyen perceraian pertama'), bertujuan untuk membubarkan perkahwinan atas alasan kelakuan responden yang tidak munasabah. Walau bagaimanapun, oleh kerana keterangan kelakuan yang tidak munasabah diperlukan, pempetisyen telah menarik balik petisyen perceraian yang pertama. Pempetisyen kemudiannya memfailkan petisyen ini atas alasan bahawa pihak-pihak kepada perkahwinan

itu telah tinggal berasingan untuk tempoh berterusan sekurang-kurangnya dua tahun. Dari segi rumah kelamin dan aset sepencarian, pempetisyen telah melepaskan sebahagian besar harta yang telah diplidnya, termasuk bahagiannya dalam rumah kelamin, aset yang dibeli di Petaling Jaya, sahamnya dalam sebuah syarikat iaitu Sykt Global Engineering and Automation ('SGEA') dan juga nafkah. Apa yang dia minta adalah untuk mengekalkan nombor telefon mudah alih tertentu ('nombor') sebagai miliknya. Nombor yang telah didaftarkan atas nama peribadinya, telah dipindahkan ke pelan telefon mudah alih yang didaftarkan atas nama SGEA selepas pempetisyen mengalami strok pada tahun 2016. Walaupun nombor itu didaftarkan atas nama SGEA, ia berterusan telah digunakan oleh pempetisyen sebagai nombor hubungan peribadinya sejak tahun 1990. Isu-isu untuk penentuan adalah: (a) sama ada perkahwinan itu telah pecahbelah dengan tidak dapat lagi dipulihkan; dan (b) sama ada pempetisyen berhak mendapat nombor telefon mudah alih itu.

Diputuskan, membenarkan petisyen:

(1) Keputusan pempetisyen untuk meninggalkan rumah sepencarian dibuat sendiri secara sukarela, dan atas kerelaannya sendiri. Dia tidak didesak mahupun dipaksa untuk membuat langkah sedemikian. Keputusan untuk meninggalkan rumah sepencarian adalah disebabkan oleh banyak masalah rumah tangga antara pempetisyen dan responden termasuk meninggalkan pempetisyen bersendirian di rumah berkunci, dalam keadaannya, tanpa sebarang pengawasan atau penjagaan. Pempetisyen telah konsisten dalam menyatakan dengan jelas dan tidak berbelah bahagi tentang hasratnya untuk membubarkan perkahwinan itu. Tidak ada sebab mengapa petisyen itu tidak dibenarkan, kerana pihak-pihak telah berpisah selama lebih daripada lima tahun. Perpisahan selama lima tahun tidak dapat dinafikan sebagai petunjuk prima facie bahawa perkahwinan itu telah pecahbelah dengan tidak dapat lagi dipulihkan. Perkahwinan itu telah mencapai titik tiada pengembalian dan mengakibatkan keadaan putus asa yang mana, mahkamah tidak sepatutnya biarkan. Perkahwinan itu sebenarnya telah pecahbelah dengan tidak dapat lagi dipulihkan dan satu-satunya penyelesaian adalah dengan membubarkannya (lihat perenggan 10–12 & 22–23).

(2) Responden adalah sangat tidak adil dan tidak saksama dalam kelakuannya dalam menentang rayuan pempetisyen untuk nombor itu. Adalah lebih memudaratkan dan tidak adil kepada pempetisyen jika dia dinafikan nombor itu. Responden, sebaliknya, berada dalam kedudukan untuk menghubungi semua rakan perniagaan dan kenalannya untuk memaklumkan kepada mereka tentang perubahan nombor SGEA. Tambahan pula, ini adalah satu-satunya perkara yang diminta oleh pempetisyen dalam petisyen ini dan adalah amat tidak adil untuk menafikan pempetisyen hanya satu perkara ini (lihat perenggan 27–29).]

Cases referred to

Daniel Sarravana a/l Sandanasamy v Malathi a/p Manikam [2021] 7 MLJ 374; [2020] 1 LNS 1104, HC (refd)

Tan Keok Yin v Cheah Saw Hong [1991] 2 MLJ 266, HC (distd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 53, 54, 54(1)(b), (1)(d), (2), 77(2)

Francis Pereira (Francis Pereira & Shan) for the petitioner.
Zalil Mohd Mess (with Ahmad Syahid Ahmad Lutfi) (Zalil Mohd & Partners) for the respondent.

Evrol Mariette Peters J:

INTRODUCTION

[1] This was a petition filed by the petitioner husband for divorce on the ground that the parties had been separated for more than two years ('this petition'). All parties had consented for this petition to be determined and disposed by way of written submissions without a full trial. This was due to the condition of the petitioner who suffers from 'expressive dysphasia' resulting in his inability to speak or write, which in turn would have been an impediment for him to testify, if a full trial had proceeded.

[2] To protect the sensitivity of the issues in these proceedings, the petitioner husband and respondent wife have been anonymised in this judgment respectively as PKR and KDS.

THE FACTUAL BACKGROUND

[3] The petitioner and respondent solemnised their marriage in October 1997 and were blessed with a child, now 19 years old. They lived in their home at Jalan Klang Lama, Kuala Lumpur ('the matrimonial home').

[4] In March 2016, the petitioner suffered a stroke, resulting in partial paralysis and his inability to speak or write.

[5] In April 2017, the petitioner left the matrimonial home to reside in Seremban, in his family's residence, where he remains until now and in their care.

[6] In November 2017, the respondent applied to court to challenge the mental capacity of the petitioner, in an attempt to compel him to return to the

matrimonial home. The court, however, found the petitioner to be of sound mind, and as a result thereof, the respondent withdrew such application.

[7] In May 2018, the petitioner filed a divorce petition ('the first divorce petition'), seeking to dissolve the marriage on ground of the respondent's unreasonable behavior. However, since proof of unreasonable behavior was required, the petitioner withdrew the first divorce petition. The petitioner then filed this petition on the ground that the parties to the marriage had lived apart for a continuous period of at least two years.

[8] This petition was allowed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether the marriage had irretrievably broken down

[9] The petitioner relied on ss 53 and 54 of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform Act') to convince the court that the marriage had irretrievably broken down. The provisions read:

> Section 53 — Breakdown of marriage to be sole ground of divorce
>
> (1) Either party to a marriage may petition for a divorce on the ground that the *marriage has irretrievably broken down*.
>
> (2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.
>
> ...
>
> Section 54 — Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say —
>
> ...
>
> (d) that the parties to the marriage *have lived apart for a continuous period of at least two years* immediately preceding the presentation of the petition.
>
> (2) In considering whether it would be just and reasonable to make a decree the *court shall consider all the circumstances*, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition. (Emphasis added.)

[10] The respondent, in contesting this petition, alleged that the petitioner was forcibly removed from the matrimonial home. In my view, based on the previous minutes of the court proceedings, it was undeniable that the petitioner's decision to leave the matrimonial home was made himself voluntarily, and on his own accord. He was neither pressured nor coerced into making such move. In fact, the decision to leave the matrimonial home was due to numerous marital problems between the petitioner and the respondent which included leaving the petitioner alone in the locked house, in his condition, without any supervision or care.

[11] In fact, ever since this petition was filed in 2019, and after having appeared before previous High Court judges, the petitioner has been consistent in making it clear and unequivocal about his intention to dissolve the marriage. He had never wavered, nor hesitated in how he had wanted to move forward.

[12] In any event, the petitioner now relied on the two-year separation between the parties and thus, there was no reason why this court should not grant this petition bearing in mind that to-date, the parties have been separated for more than five years. A five-year separation is undeniably a prima facie indication that the marriage had irretrievably broken down.

[13] The respondent relied on the case of *Tan Keok Yin v Cheah Saw Hong* [1991] 2 MLJ 266, to argue that the two-year separation alone was not sufficient for this court to conclude that the marriage had broken down irretrievably, as the respondent in the present case had contested it.

[14] In my view, the facts of *Tan Keok Yin v Cheah Saw Hong* must be distinguished from the facts of the present case. In *Tan Keok Yin v Cheah Saw Hong,* the petitioner had relied also on s 54(1)(b) of the Law Reform Act, which reads:

> Section 54 — Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say —
>
> ...
>
> (b) that the *respondent has behaved in such a way that the petitioner cannot reasonably be expected to live* with the respondent; (Emphasis added.)

[15] As such, in *Tan Keok Yin v Cheah Saw Hong,* the petitioner had to prove that the respondent had conducted herself in an unreasonable manner, since that was his allegation. This was indicated in the following paragraph:

A Against this stand taken by the husband petitioner the wife respondent, in her answer (which I have reproduced earlier and I need not repeat it), had put up a reasonable explanation to support her contention that the marriage has not irretrievably broken down. *Thereupon in his reply, the husband petitioner added a twist to his petition by relying on fact (b) of s 54(1) of the Law Reform Act namely that*
B *the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with her and he gave a long list of allegations of misconduct on the part of the respondent which I have earlier stated and I need not repeat those allegations again. These allegations were categorically denied by the wife respondents*. (Emphasis added.)

C

[16] Furthermore, in *Tan Keok Yin Yin v Cheah Saw Hong*, the court took the view that it was the petitioner who had behaved in an unreasonable manner as he had embarked on extra-marital affairs.

D **[17]** In the present case, the petitioner relied on para (d) of s 54(1)(d) of the Law Reform Act, and not para (b). Since it was undisputed that the parties had lived apart for five years, that itself was prima facie proof that the marriage had irretrievably broken down and it was for the respondent to show otherwise, which in this case she had failed to do. Her only contention was that the
E petitioner was forcibly removed from the matrimonial home, which I found to be untenable, bearing in mind that the petitioner had made his intention clear to this court.

[18] In any event, based on the respondent's own conduct, the petitioner, in
F his condition, had felt insecure, vulnerable and neglected by the respondent. He felt happier and safer with other members of his family including his mother and siblings, and had voluntarily left the matrimonial home to live with his family in Seremban.

G **[19]** The respondent had also relied on the case of *Daniel Sarravana a/l Sandanasamy v Malathi a/p Manikam* [2021] 7 MLJ 374; [2020] 1 LNS 1104 to contend that living apart was not an automatic basis to conclude that the marriage had irretrievably broken down as this court was empowered to inquire into the facts and circumstances alleged as causing or leading to such
H breakdown. Faiza Jamaludin J had commented on the relevant provisions of the Law Reform Act, in the following passages:

[20] Section 53 of the LRA provides as follows:

(1) Either party to a marriage may petition for a divorce on the ground that
I the marriage has irretrievably broken down.

(2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

[21] Section 54(1) of the LRA provides that in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one of the following facts:

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

[22] Pursuant to s 54(2) of the LRA, *the court, in considering whether it would be just and reasonable to make a decree, shall consider all the circumstances, including the conduct of the parties* and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition. (Emphasis added.)

[20] The respondent was correct in submitting that this court was empowered to look into the facts and circumstances of the case. In fact, it was only after inquiring into the facts of the present that this court arrived at the conclusion that the marriage had irretrievably broken down.

[21] At this juncture, I am compelled to say that although it is not the function of this court to encourage divorces or separations, if a marriage is beyond redemption, it is only fair to facilitate and ensure that the parties move forward as painless as possible. Hence, while this court, on one hand, should go to lengths in upholding the sanctity of a marriage, on the other hand, it would be an affront to public policy and justice to insist on the continuous of a marriage that had ceased to exist on every level, including emotional and physical. In other words, it would be extremely unjust if this court was to subscribe to the doctrine of 'what therefore God hath joined together, let not man put asunder'.

[22] In the present case, the marriage had a reached a point of no return and the respondent was, in my view, clinging on to an empty shell of a union, resulting in a state of hopelessness which, in my view, this court should not countenance.

[23] After considering all the evidence put before this court, I was of the view that the marriage had in fact irretrievably broken down and the only way forward was to dissolve it.

Whether the petitioner was entitled to the mobile telephone number

[24] In terms of the matrimonial home and matrimonial assets, the petitioner had relinquished most of the items he had pleaded for, which included his share in the matrimonial home, an asset purchased in Petaling Jaya, and his shares in the company, Sykt Global Engineering and Automation ('SGEA'), and even maintenance which he could have pleaded pursuant to s 77(2) of the Law Reform Act, which reads:

> Section 77 — Power for court to order maintenance of spouse
>
> ...
>
> (2) The court shall have the corresponding power to *order a woman to pay maintenance to her husband or former husband where he is incapacitated*, wholly or partially, from earning a livelihood by reason of mental or *physical injury or ill-health*, and the court is satisfied that having regard to her means it is reasonable so to order. (Emphasis added.)

[25] All he asked for was to retain a particular mobile telephone number ('the number') as his. Although the number is registered in the name of SGEA, it had continuously been utilised by the petitioner as his personal contact number since 1990. It appeared that the number which had been registered in his personal name, was transferred to a mobile telephone plan which was registered in the name of SGEA, only after the petitioner had suffered the stroke in 2016.

[26] The petitioner submitted that he was attached to the number as he had been using it for almost 30 years, and had used this number to download and access the MySejahtera application. All that the petitioner sought was for the number to be transferred to his individual name.

[27] I found the respondent to be extremely inequitable and injudicious in her conduct in resisting the petitioner's plea for the number, bearing in mind that this issue was raised before this court in November 2021, wherein it was agreed by parties that the respondent, being the sole proprietor of SGEA, would transfer the number to the name of the petitioner. However, the respondent had subsequently changed her mind, and now resisted the petitioner's claim, on the premise that the number belonged to SGEA, and that parting with the number would be prejudicial as all business contacts would attempt to communicate with SGEA through that number.

[28] In my view, a balance had to be struck and an equilibrium achieved between the countervailing demands of both the petitioner and respondent with regard to the number. Looking at the justice of the case and after balancing the interests of both parties, I took the view that it would be more detrimental

and inequitable to the petitioner if he was denied the number. The respondent, on the other hand, was in a position to contact all her business associates and acquaintances to inform them of the change of the number of SGEA.

[29] Furthermore, I could not ignore the fact that this was the only item that the petitioner sought in this petition, and looking at the facts holistically, it would be extremely unfair to deny the petitioner just this one thing.

CONCLUSION

[30] In the upshot, therefore, and based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, and written and oral submissions of both parties, this petition was allowed.

Petition allowed.

Reported by Ahmad Ismail